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No. 07-1239

IN THE
Supreme Court of the United States

DONALD C. WINTER, Secretary of the Navy, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

After determining that the Navy had likely violated the National Environmental Policy Act of 1969 ("NEPA") and that a preliminary injunction was warranted, the district court conducted fact-finding proceedings focused on the contested issue of whether the Navy could train and certify its strike groups while adhering to proposed mitigation protocols that would reduce environmental harm. The district court rejected some mitigation measures but imposed others after finding that those measures would permit the Navy to proceed with the training and certification activities. The Navy then asked the Council on Environmental Quality ("CEQ")—an executive-branch administrative agency with no expertise in naval training and in which Congress vested no adjudicatory authority—to determine, in an *ex parte* proceeding, that the Navy could not train and certify its strike groups if it complied with the ordered mitigation measures and that the injunction therefore created "emergency circumstances." After CEQ issued a letter disagreeing with the court's factual findings and therefore finding "emergency circumstances," the Navy argued that the district court was required to dissolve the preliminary injunction. The questions presented are:

1. Whether the district court was required to set aside its findings of fact and dissolve an injunction based thereon because CEQ, an administrative agency with no expertise bearing on the subject matter of the court's factual findings and in which Congress has vested no adjudicatory powers, disagreed with those findings and therefore found "emergency circumstances"?

2. Whether, in any event, the district court's factual findings were clearly erroneous or the district court otherwise abused its discretion in granting injunctive relief.

*Submitted pursuant to Supreme Court Rule 24.2. *See also Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 266 n.12 (1992).

TABLE OF CONTENTS

Page

STATEMENT 1

SUMMARY OF ARGUMENT 13

ARGUMENT 18

I. The District Court Was Not Compelled To Set Aside Its Own Findings And Injunction Based Upon CEQ's Conclusory Determination That Those Findings Were Wrong 18

A. CEQ Is Not Authorized to Redetermine Factual Issues Decided By A District Court 19

B. Allowing CEQ To Sit As A Court Of Errors Violates The Separation of Powers Doctrine 24

C. CEQ's Findings Would Be Invalid Even If The District Court Had Not Already Decided The Same Issue 29

1. Congress Has Not Delegated Adjudicatory Authority To CEQ 30

2. CEQ's Decision Is Contrary To Congress' Intent In Enacting NEPA 33

3. CEQ's Decision Is Invalid Based On The Agency's Failure To Comply With The APA 36

Page

II. The Courts Below Applied Traditional Equitable Principles In Granting Tailored Preliminary Relief 38

A. The MMPA Exemption Does Not Indicate Congressional Intent to Curtail Courts' Equitable Powers To Enforce NEPA 38

B. Plaintiffs' Showing of a "Near Certainty" of Irreparable Harm Far Exceeds That Necessary To Support The Injunction 41

C. The District Court Did Not Abuse Its Discretion in Balancing the Equities 51

CONCLUSION 58

TABLE OF AUTHORITIES

Page(s)

Cases:

Abbott Labs. v. Andrx Pharms.,
473 F.3d 1196 (Fed. Cir. 2007) 22

Adams Fruit Co., Inc. v. Barrett,
494 U.S. 638 (1990) 32

Advocates for Highway and Auto Safety v. Fed'l Motor Carrier Safety Admin.,
429 F.3d 1136 (D.C. Cir. 2005) 32

Alaska Dep't of Envtl. Conservation v. E.P.A.,
540 U.S. 461 (2004) 25, 27

Am. Communications Ass'n v. United States,
298 F.2d 648 (2d Cir. 1962) 37

Amoco Prod. Co. v. Vill. of Gambell,
480 U.S. 531 (1987) 39, 41, 47, 50

Anderson v. Bessemer City,
470 U.S. 564 (1985) 42

Anderson v. Evans,
314 F.3d 1006 (9th Cir. 2002) 44

Andrus v. Sierra Club,
442 U.S. 347 (1979) 31

Anglers of the Au Sable v. U.S. Forest Serv.,
402 F. Supp. 2d 826 (E.D. Mich. 2005) 47

Page(s)

Ashcroft v. ACLU,
542 U.S. 656 (2004)..... 51

Auer v. Robbins,
519 U.S. 452 (1997)..... 19

Blackwelder Furniture Co. v. Seilig Mfg. Co.,
550 F.2d 189 (4th Cir. 1977) 49

Block v. SEC,
50 F.3d 1078 (D.C. Cir. 1995)..... 36

Boumediene v. Bush,
128 S.Ct. 2229 (2008) 55

Bowen v. Georgetown Univ. Hosp.,
488 U.S. 204 (1988)..... 55

Brown v. Choate,
411 U.S. 452 (1973)..... 49

Burger v. Kemp,
483 U.S. 776 (1987)..... 55

Burlington Truck Lines, Inc. v. United States,
371 U.S. 156 (1962)..... 33

Califano v. Yamasaki,
442 U.S. 682 (1979)..... 38

Calvert Cliffs' Coordinating Comm., Inc. v.
U.S. Atomic Energy Comm'n,
449 F.2d 1109 (D.C. Cir. 1971)..... 34, 35

Campbell v. U.S. Dep't of Justice,
164 F.3d 20 (D.C. Cir. 1998)..... 56

Page(s)

Carey v. Klutznick,
637 F.2d 834 (2d Cir. 1980) 49

Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.,
333 U.S. 103 (1948) 26

Christensen v. Harris Cty.,
529 U.S. 576 (2000) 31

Coldiron v. U.S. Dep't of Justice,
310 F. Supp. 2d 44 (D.D.C. 2004) 56

Commodity Futures Trading Comm'n v. Schor,
478 U.S. 833 (1986) 26

Connor v. U.S. Civ. Serv. Comm'n,
721 F.2d 1054 (6th Cir. 1983) 37

CSX Transportation Co. v. Novolog Bucks Cty.,
502 F.3d 247 (3d Cir. 2007) 23

Darby v. Cisneros,
509 U.S. 137 (1993) 41

Davis v. Mineta,
302 F.3d 1104 (10th Cir. 2002) 46

DeLorean Motor Co., In Re,
775 F.2d 1223 (6th Cir. 1985) 50

District of Columbia v. Murphy,
314 U.S. 441 (1941) 55

Doran v. Salem IMM, Inc.,
422 U.S. 922 (1975) 50

Page(s)

Duncan v. Kahanamoku,
327 U.S. 304 (1946)..... 55, 56

Duvall v. Attorney General of the United States,
436 F.3d 382 (3d Cir. 2006)..... 22

EEOC v. Arabian Am. Oil Co.,
499 U.S. 244 (1991)..... 31

Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.,
426 U.S. 776 (1976)..... 34

Freytag v. Commissioner,
501 U.S. 868 (1991)..... 28

Fund for Animals v. Frizzell,
402 F.Supp. 35 (D.D.C. 1975)..... 46

Fund for Animals v. Frizzell,
530 F.2d 982 (D.C. Cir. 1975)..... 45, 46

Fund for Econ. Trends v. Heckler,
756 F.2d 143 (D.C. Cir. 1985)..... 47

Goldie's Bookstore v. Superior Court,
739 F.2d 466 (9th Cir. 1984) 50

Greater Yellowstone Coalition v. Flowers,
321 F.3d 1250 (10th Cir. 2003) 46

Gross Common Carrier, Inc. v. Baxter Healthcare Corp.,
51 F.3d 703 (7th Cir. 1995) 23

Page(s)

Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999) 50

Hamdan v. Rumsfeld, 548 U.S. 557 (2006) 56

Hawksbill Sea Turtle v. Federal Emerg. Mgm't Agency, 126 F.3d 461 (3d Cir. 1997) 23

Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) 24, 25

Hecht Co. v. Bowles, 321 U.S. 321 (1944) 51

Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992) II

Humane Soc'y v. Gutierrez, 523 F.3d 990 (9th Cir. 2008) 47

Humphrey's Executor v. United States, 295 U.S. 602 (1935) 25

Indep. U.S. Tanker Owners Comm. v. Lewis, 690 F.2d 908 (D.C. Cir. 1982) 36

Indust. Elect. Corp. v. Cline, 330 F.2d 480 (3d Cir. 1964) 49

Izaak Walton League of Am. v. Marsh, 655 F.2d 346 (D.C. Cir. 1981) 36

Page(s)

Marsh v. Oregon Natural Res. Council,
490 U.S. 360 (1989)..... 40

Martinez v. Mathews,
544 F.2d 1233 (5th Cir. 1976) 49

Miller v. French,
530 U.S. 327 (2000)..... 29

Mistretta v. United States,
488 U.S. 361 (1989)..... 24, 27

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.,
463 U.S. 29 (1983) 31

Nat'l Audubon Soc'y v. Navy,
422 F.3d 174 (4th Cir. 2005) 46, 48

Nat'l Parks & Conservation Ass'n. v. Babbitt,
241 F.3d 722 (9th Cir. 2001) 47, 48, 51

Nat'l Wildlife Fed'n v. Burford,
835 F.2d 305 (D.C. Cir. 1987)..... 49

Nichols v. Bd. of Trustees of the Asbestos Workers Local 24 Pension Plan,
835 F.2d 881 (D.C. Cir. 1987)..... 37

Northwest Airlines, Inc. v. County of Kent, Mich.,
510 U.S. 355 (1994)..... 23

NRDC v. Evans,
232 F. Supp. 2d 1003 (N.D. Cal. 2002) 39

Page(s)

OMI v. Gates,
546 F. Supp. 2d 960 (D. Haw. 2008) 9, 43

Paramount Land Co. v. Cal. Pistachio Comm'n,
491 F.3d 1003 (9th Cir. 2007) 50

Pharmaceutical Research & Mfgs. of Am. v. Walsh,
538 U.S. 644 (2003)..... 51

Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995)..... 27, 28, 29

Porter v. Warner Holding Co.,
328 U.S. 395 (1946)..... 39

Register.com, Inc. v. Verio, Inc.,
356 F.3d 393 (2d Cir. 2004) 49

Robertson v. Methow Valley Citizens Council,
490 U.S. 332 (1989)..... 40, 43

Robertson v. Seattle Audubon Soc'y,
503 U.S. 429 (1992)..... 29

Sierra Club v. Marsh,
872 F.2d 497 (1st Cir. 1989) 47

Skidmore v. Swift & Co.,
323 U.S. 134 (1944)..... 30

Tri-State Generation and Transmission Ass'n, Inc. v. Shoshone River Power, Inc.,
805 F.2d 351 (10th Cir. 1986) 49

Page(s)

TVA v. Hill,
437 U.S. 153 (1978)..... 39

United States v. Jefferson Elec. Mfg. Co.,
291 U.S. 386 (1934)..... 26

United States v. Klein,
80 U.S. 128 (1872) 28

United States v. Larionoff,
431 U.S. 864 (1977)..... 33

United States v. Mitchell,
463 U.S. 206 (1983)..... 26

United States v. Oakland Cannabis Buyers' Coop.,
532 U.S. 483 (2001)..... 39

United States v. Vogel Fertilizer Co.,
455 U.S. 16 (1982) 33

United States v. Waters,
133 U.S. 208 (1890)..... 26

United States v. Western Pac. R.R. Co.,
352 U.S. 59 (1956) 23

United States. v. Mead Corp.,
533 U.S. 218 (2001)..... 30, 31

Virginian Ry. Co. v. Sys. Fed'n No. 40,
300 U.S. 515 (1936)..... 39

Water Keeper Alliance v. U.S. Dep't of Def.,
271 F.3d 21 (1st Cir. 2001) 46

Page(s)

Weinberger v. Romero-Barcelo,
456 U.S. 305 (1982) 39

Statutes and Regulations

Administrative Procedure Act,
5 U.S.C. § 555(b) 15, 36, 37
5 U.S.C. § 706(2)(D) 36

Composition of the Dept. of the Navy,
10 U.S.C. § 5062 34

Fiscal Year 2001 National Defense Auth. Act, Pub. L. No. 106-398, § 317, 114 Stat. 1654, 1654A-57 (2000) 33

Marine Mammal Protection Act of 1972,
16 U.S.C. § 1371(f)(1) 38
16 U.S.C. § 1362(13) 5
16 U.S.C. § 1362(18)(B)(ii) 6

The National Environmental Policy Act of 1969, 42 U.S.C. § 4321 33
42 U.S.C. § 4331(a) 34
42 U.S.C. § 4332 50
42 U.S.C. § 4332(2)(C) 6, 33
42 U.S.C. § 4332(2)(C)(iii) 8
42 U.S.C. § 4344 ..... 13, 21, 30

Nuclear Waste Policy Act of 1982
42 U.S.C. § 10141(c) 33

Pub. L. No. 108-136 40

Page(s)

Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1652(d) 33

40 C.F.R. § 1500.6 34

40 C.F.R. § 1502.14 8

40 C.F.R § 1506.11 ..... 14, 35, 42

Miscellaneous

71 Fed. Reg. 38710 (2006)..... 4, 43

71 Fed. Reg. 38718-19 (2006) 45

71 Fed. Reg. 38727 (2006)..... 4, 42, 43

72 Fed. Reg. 37409 (2007)..... 6

152 Cong. Rec. H7135 (2006)..... 40

Exec. Order No. 11991 3 C.F.R. 123 (1977), reprinted as amended in 42 U.S.C. § 4331 (2000)..... 30

Fed. R. App. Proc. 52..... 41

H.R. Rep. No. 108-106 (2003) 40

H.R. Rep. No. 108-354 (2003) (Conf. Rep.)..... 39, 40

H.R. Rep. No. 109-504 (2006) 40

H.R. Rep. No. 109-676 (2006) 40

S. Rep. No. 94-996 (1976) 41

Page(s)
U.S. Const. art. III, § 1 25

The Federalist No. 81 (J. Cooke ed. 1961)..... 27

The Federalist No. 48 (J. Cooke ed. 1961)..... 27

Wright & Koch, Federal Practice and Procedure: Judicial Review § 8136 36

STATEMENT

The district court found that Petitioners ("the Navy") had likely violated the National Environmental Policy Act of 1969 ("NEPA") by failing to prepare an environmental impact statement to consider the effects that certain long-planned naval training exercises using high-intensity sonar would have on marine mammals off the coast of Southern California. The Navy does not question that finding in this Court. Nor does the Navy challenge here most of the elements of the preliminary injunction entered by the district court and later modified by the Ninth Circuit—a tailored injunction that has allowed the Navy to proceed with the training notwithstanding its NEPA violations. Instead, the Navy argues that the district court erred when it refused to strike from its injunction two mitigation measures because of their alleged effect on the Navy's training and certification program. The court, after reviewing extensive evidence gathered during detailed fact-finding proceedings, found that the Navy could continue with its training exercises using the contested measures, and therefore declined to strike them from the injunction.

The Navy argues that a letter it procured from another executive-branch agency, the White House Counsel on Environmental Quality ("CEQ"), disagreeing with the district court's finding, compelled the court to strike the challenged measures. This novel argument, reduced to its essentials, is that an Article III court must set aside its findings of fact and modify an injunction because an administrative agency in which Congress has vested no adjudicatory authority, and which lacks

any expertise in the issue in dispute, disagrees with the court's findings. The consequence of the Navy's argument—that CEQ was entitled to sit as a "court of errors" in review of the district court's findings—ignores not just NEPA but bedrock principles of administrative law and constitutional doctrine concerning the separation of powers between the executive and judicial branches.

The Navy further invites the Court to subvert established principles of equity jurisprudence and appellate review in favor of an unprecedented and unsound rule of absolute deference to the views of the Executive. It was not clearly erroneous for the district court to find that the substantial evidence of the Navy's successful pre-litigation use of mitigation measures submitted by Respondents was more persuasive than the Navy's post-litigation declarations asserting that such mitigation would interfere with training. Instead of arguing that the court's factual findings were clearly erroneous, which is the applicable standard of review, the Navy argues that a federal court must accept the Executive's factual assertions when military matters are at issue, even when, as here, the evidence convinces the court that the Executive's representations are inconsistent with the factual record. This Court has wisely declined to foreclose judicial review of Executive decisions touching on military affairs. Once again, the Executive's attempt to circumvent the courts should be rejected.

1. This action arose from the Navy's plan to use mid-frequency active ("MFA") sonar during 14 training exercises off the coast of Southern California between February 2007 and January 2009 (the

"SOCAL exercises"). Ignoring its own findings regarding the substantial harm that its use of MFA sonar during the SOCAL exercises would cause to marine mammals, as well as the precedent developed in prior litigation concerning use of MFA sonar, the Navy refused to prepare an Environmental Impact Statement ("EIS"), refused to thoroughly consider alternatives as required by NEPA, and refused to consider or employ many of the safeguards it had used in the past to avoid significant harm to marine mammals. These violations of federal law are not contested here.

2.a. The coastal waters off Southern California are among the richest and most biologically diverse in the world. App. 11a; J.A. 785-86. They contain at least 37 species of marine mammals, including a globally important population of endangered blue whales and several small regional populations, including pygmy sperm whales and coastal bottlenose dolphins, for which the loss or impairment of even a few members would compromise the entire population. App. 11a; 07-56157 C.A. E.R. ("E.R.") 341-43; J.A. 475-76, 533-34. The California shelf margin is also one of the world's "key areas" for at least seven species of beaked whales, including one (Perrin's beaked whale) whose entire known range falls between San Diego and Monterey. J.A. 715; 08-55054 C.A. S.E.R. ("S.E.R.2") 149-80.

MFA sonar generates piercing underwater sound at extreme pressure levels. Its effects on marine mammals in proximity to the sonar source are devastating. Mass strandings of beaked whales and other marine mammals, including pygmy sperm whales, have been caused by the use of active sonar.

J.A. 666-705, 717-23, 730-31, 735, 737-446 (published scientific studies and reports); J.A. 756-79; 07-56157 C.A. S.E.R. ("S.E.R.") 180-90 (Navy documents and reports). Moreover, beaked whales are particularly vulnerable and have shown an array of physical traumas in sonar-related strandings, including hemorrhaging around the brain, ears, kidneys, and acoustic fats; acute spongiotic changes in the central nervous system; and gas/fat emboli in the lungs, liver, and other vital organs. J.A. 600-02, 673-89, 738-41, 760; S.E.R. 180. These pathologies are severe and can cause nervous and cardiovascular system dysfunction, respiratory distress, disorientation, and death. J.A. 601, 666-67, 674-76, 680, 685. Such injuries harm marine mammals regardless of whether the animals later strand and are discovered. J.A. 601-02, 658, 684-85, 728, 760.

MFA sonar has also been shown to cause mass habitat displacement and hearing loss, as well as adverse behavioral alterations—including changes in feeding, diving, and social behavior—that the National Marine Fisheries Service ("NMFS") has characterized as "profound." J.A. 360-62, 474; 71 Fed. Reg. 38710, 38727 (2006). Observations by biologists during MFA sonar exercises have demonstrated the expansive range over which these impacts occur, indicating sharp declines in commonly seen species over entire exercise areas. J.A. 473-74, 582-83, 590-91, 822; S.E.R.2 232-33. For example, in the Bahamas, sightings of one beaked whale population fell to zero following a sonar-related stranding in 2000 and had not returned to pre-stranding levels five years later. J.A. 644, 656, 701.

b. The Navy's February 2007 Environmental Assessment ("EA") predicted that the planned SOCAL exercises would result in approximately 170,000 "takes"[1] of marine mammals, an extraordinary number relative to the size of cetacean populations off Southern California. J.A. 223-24. For instance, the EA projected that a deep-water stock of as small as 119 pygmy sperm whales would suffer 900 takes during each year of the challenged exercises. J.A. 223-24; E.R. 341. Similarly, the SOCAL exercises would annually take as much as 25 percent of the eastern Pacific population of endangered blue whales and 15 to 20 percent of five distinct dolphin populations. J.A. 223-24; E.R. 341-43; App. 65a-66a.

The Navy estimated that use of MFA sonar in the SOCAL exercises would result in significant "Level A" exposure, defined as exposure that "injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild," including through permanent hearing loss and cranial hemorrhaging. J.A. 160-61. This included 436 instances of Level A exposure in Cuvier's beaked whales, which represents as much as one-third of the entire west-coast stock of that species. J.A. 223-24; S.E.R.2 926-27; App. 19a.[2]

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[1] As defined in the EA and federal law, "take" means "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." E.R. 114; 16 U.S.C. § 1362(13). The Navy's various attempts to minimize the significance of the takes predicted by its EA fail. *See infra* pp. 47-49.

[2] This level of take dwarfs the amount creditable to commercial fishing: fisheries along the west coast reported no "bycatch," net entanglements, or injury of Cuvier's beaked whale

The Navy also estimated approximately 170,000 "Level B" exposures, defined as exposure that "disturbs or is likely to disturb a marine mammal or marine mammal stock by causing disruption of natural behavioral patterns including, but not limited to, migration, surfacing, nursing, feeding, or sheltering where such behaviors are abandoned or significantly altered." J.A. 161, 223-24. These Level B takes exclude insignificant disruptions and include only more serious harms, including habitat displacement, temporary hearing loss, and other harm to mammals' critical ability to communicate, forage, avoid predators, and multiply. 16 U.S.C. § 1362(18)(B)(ii); *see also* 72 Fed. Reg. 37409 (2007) (defining "Level B" as a "significant disturbance in a biologically important behavior"); App. 17a.

Despite the overwhelming evidence of predicted harm, the Navy concluded that the SOCAL exercises would not have any significant impact on the environment and that NEPA therefore did not require it to prepare an EIS.[3] J.A. 225.

3.a. The Navy's decision to forego an EIS ignored the judicial precedent and mitigation evidence developed in connection with the Rim of the Pacific ("RIMPAC") sonar training exercises off the Hawaiian Islands in July 2006. In the litigation relating to those exercises, which concluded seven months before the Navy issued its EA in the instant

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and other deep-water beaked whale species during their most recent 5-year enforcement period. J.A. 726; S.E.R.2 918, 923, 927-28.

[3] NEPA requires an agency to prepare an EIS for any action that may have significant effects on the environment. 42 U.S.C. § 4332(2)(C).

case, the district court enjoined the Navy from proceeding with MFA sonar exercises for failure to prepare an EIS. S.E.R. 610-16. The injunction was based on substantially the same NEPA violations found here, including a finding that the Navy's proposed mitigation was inadequate. *Id.*; App. 207a-208a.

The RIMPAC litigation was resolved in July 2006 with a stipulated consent decree, pursuant to which the Navy agreed to implement, *inter alia*, the following mitigation measures: a 1,000 meter safety zone, with a 6 decibel power-down if marine mammals are within 1,000 meters of the sonar source; an expanded 2,000 meter safety zone in surface-ducting conditions; a power-down in low-visibility conditions; and geographical restrictions (*e.g.*, no sonar use within 25 kilometers of the 200 meter isobath (coastal waters)). App. 26a-28a. The Navy's after-action report for the RIMPAC exercise reported 472 total hours of MFA sonar use and a loss of only 8 hours due to mitigation measures. App. 28a-29a. Thereafter, for the balance of 2006, the Navy adopted most of the mitigation measures used in RIMPAC, including the coastal exclusion, the expanded safety zone during surface-ducting conditions, and the 6 decibel power-down requirement at night and in low-visibility conditions, for all of its range exercises, including certification exercises. J.A. 369-75; App. 72a-73a, 190a.

b. The Navy's February 2007 EA for the SOCAL exercises estimated roughly *five times* as many takes of marine mammals as in the previously-enjoined RIMPAC exercises, App. 204a, S.E.R.2 186, while proposing even less mitigation than the court had

found inadequate in the RIMPAC litigation. App. 29a-30a, 33a, 72a-73a, 209a-210a. This mitigation reversal backslid not only from RIMPAC and the Navy's post-RIMPAC mitigation protocols, but also from mitigation measures that the Navy had used repeatedly and successfully in MFA sonar exercises from 2002 until RIMPAC. For example, in COMPTUEX and JTFEX certification exercises conducted between 2002 and at least 2005, the Atlantic Fleet successfully employed geographic restrictions on MFA sonar use in areas with high densities of marine mammals, used "simulated geography" to relocate "choke-point" transits and near-shore exercises on three east-coast ranges into deep, open water, and barred or minimized nighttime use of sonar. S.E.R.2 447-51; J.A. 804-05.

c. None of these proven measures was included in the EA for the SOCAL exercises. The Navy discarded them "without providing convincing (or in some cases, any) evidence compelling its change in policy." App. 190a-191a (M. Smith, J., dissenting); *see also* App. 72a-74a.

The obligation to consider reasonable alternatives and appropriate mitigation in an EA (and in an EIS, when, as here, an EIS was required) lies at the heart of NEPA. 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. § 1502.14; App. 209a-210a. The Navy has repeatedly violated the statute in planning MFA sonar exercises. Time and again it has failed to prepare an EIS for MFA sonar training despite significant effects on the marine environment, and its EAs have consistently failed to properly consider alternatives and mitigation. Every court considering the issue—in the RIMPAC litigation, a parallel case in Hawaii, and the

instant case—has found the Navy's EAs to be legally inadequate for these reasons. App. 69a-72a, 206a-210a; S.E.R. 620-622; *OMI v. Gates*, 546 F. Supp. 2d 960, 975-77 (D. Haw. 2008).

The mitigation measures that the Navy did adopt for the SOCAL exercises boiled down to a narrow 1,000 yard safety zone to be implemented only if marine mammals were spotted from the deck of fast-moving ships—a mitigation scheme the district court concluded was "grossly inadequate to protect marine mammals from debilitating levels of sonar exposure" and "woefully inadequate and ineffectual." App. 140a, 215a; *see* App. 32a-33a; S.E.R. 349-50 (5% detection rate); S.E.R. 355 (less than 2% detection rate for beaked whales directly in ship's path).

In addition, the Navy's EA for the SOCAL exercises failed to consider the cumulative effects of the exercises on profoundly affected species such as beaked and pygmy whales. The EA dismissed these effects in a single paragraph based on the supposed effectiveness of mitigation measures that the district court had already found to be ineffectual in RIMPAC. App. 210a-211a; E.R. 298.

4. Respondents commenced this action on March 22, 2007. On August 7, 2007, the district court granted in part Respondents' motion for a preliminary injunction and enjoined the Navy from conducting the then-remaining 11 SOCAL exercises based on the Navy's failure to prepare an EIS and the fatal defects in the EA. App. 195a-218a. On November 13, 2007, the Ninth Circuit affirmed the district court's finding that the Navy had likely violated NEPA but remanded to the district court with instructions to issue a "tailored injunction" that

would ensure that the Navy could train effectively while providing meaningful safeguards for the protection of the environment. App. 171a-174a.

The district court issued its tailored injunction on January 3, 2008, after receiving extensive briefing from the parties and touring the destroyer *USS Milius* to improve its understanding of the feasibility of proposed mitigation measures. App. 150a. In tailoring its order, the district court expressly acknowledged and credited the government's military readiness concerns – it rejected many of the geographic exclusions proposed by Respondents, accepted the Navy's representations that the bathymetry off southern California presents unique training opportunities, and declined to limit the use of sonar at night or in conditions of low visibility notwithstanding the Navy's adoption of such limitations throughout the latter half of 2006. App. 164a-170a; 103a-104a.

The injunction permitted the Navy to conduct the remaining SOCAL exercises provided that it: (1) suspend use of MFA sonar when a marine mammal is detected within 2,200 yards of the sonar source; (2) reduce the MFA sonar level by 6 decibels when surface-ducting conditions are detected; (3) exclude MFA sonar from within 12 nautical miles of the California coastline; (4) enhance efforts at monitoring for marine mammals, including the use of aircraft for at least 60 minutes before exercises begin; (5) monitor for marine mammals for 10 minutes before helicopters employ active dipping sonar; and (6) exclude MFA sonar from the Catalina Basin between

Santa Catalina and San Clemente Islands. App. 164a-170a.[4]

In its briefing and argument on the scope of the tailored injunction, the Navy objected to all six measures, claiming that they would prevent it from training and certifying its troops. App. 102a-105a. The district court ruled to the contrary, finding that the Navy's extensive and successful training with similar mitigation measures was more probative than the Navy's litigation-crafted declarations to the contrary. App. 103a-105a, 81a-82a.

5. One week after the district court entered its tailored injunction, the Navy initiated *ex parte* proceedings before CEQ in an attempt to circumvent the court's order. The Navy presented CEQ with a one-sided portion of the district court record, containing only the Navy's evidence and arguments and omitting virtually all of the evidence and argument that had compelled the district court to issue the injunction. *See* App. 237a.

Three business days later, CEQ provided the Navy a letter stating that "[d]iscussions between our staffs, your letter and supporting documents, and the classified declaration and briefing I have received, have clearly determined that the Navy cannot ensure the necessary training to certify strike groups for deployment under the terms of the injunctive orders." App. 240a. Within minutes of CEQ's determination,

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[4] On January 10, 2008, in response to arguments raised by the Navy in a stay application, the district court modified the preliminary injunction by narrowing the safety zone, surface-ducting and monitoring measures contained in the January 3, 2008 order. App. 145a-149a.

the Navy moved to vacate the entire injunction based on CEQ's action, arguing that CEQ's action mooted the injunction (the Navy has since abandoned this argument) and that CEQ's action "removed" the legal basis for Respondents' claims. Pet. D.Ct. Reply re *Ex Parte* Application for Vacatur (Dkt. No. 144) at 5. The district court denied the Navy's motion on February 4, 2008, rejecting both of the Navy's arguments, and left each of the prescribed mitigation measures in place. App. 96a-137a.

On appeal to the Ninth Circuit, the Navy took issue with only two of the six mitigation measures imposed by the district court—the 2,200 yard shutdown requirement and the 6 decibel power-down requirement during significant surface-ducting conditions—notwithstanding its earlier contention that the other four measures would impair its ability to train and certify its troops. App. 35a. The Ninth Circuit affirmed. With respect to the two measures still contested by the Navy, the Ninth Circuit agreed with the district court's finding that the record contained significant evidence of the Navy's ability to successfully train and certify strike groups using those measures, including the Navy's own after-action reports from eight prior certification exercises in the SOCAL operating area. App. 78-89a.

Acting "out of an abundance of caution," the Ninth Circuit nonetheless modified the injunction pending further review to satisfy the remaining concerns stated by the Chief of Naval Operations in his affidavit. App. 91a-95a. Specifically, the Ninth Circuit modified the 2,200 yard safety zone so that the Navy would be required only to reduce, rather than suspend, its use of MFA sonar if marine

mammals are detected at a "critical point in the exercise," defined as a point when, in the discretion of the Admiral overseeing the exercise or the commander of the sonar-emitting vessel, continued use of MFA sonar is critical to the certification of a strike group or the effective training of its personnel. App. 93-94a. The Ninth Circuit further modified the power-down requirement during significant surface-ducting conditions so that it would apply only when a marine mammal is detected within a specified distance from the sonar source. App. 94-95a.

Finally, the Ninth Circuit modified the injunction to provide that the Navy could seek emergency relief from the district court in the unlikely event that the required mitigation measures, once implemented, did interfere with training and certification. App. 88a-89a. The Navy has trained and certified its strike groups since February 2008 without seeking such relief.

SUMMARY OF ARGUMENT

1. The district court was not required to set aside its findings of fact and dissolve its injunction in response to CEQ's subsequent disagreement with those findings.

a. The "duty and function" of CEQ under NEPA is limited to gathering and analyzing information and making recommendations to the President to assist in formulating national environmental policy. *See* 42 U.S.C. § 4344. Congress did not delegate to CEQ the authority to review a district court's factual findings governing specific terms of an injunction, make contrary findings, and then cause the court to dissolve its injunction in favor of CEQ-sponsored

"alternative arrangements." The Navy's argument that the court was obligated to defer to CEQ's unexpressed interpretation of the word "emergency" in 40 C.F.R. § 1506.11 is beside the point, because even if every "condition of urgent need," Br. 24, were an "emergency," the district court's factual finding that the Navy *could* effectively train and certify its strike groups under the terms of the injunction establishes that no urgent need exists. The Navy cites nothing in NEPA, or any other principle of law, that requires the district court to set aside its own factual findings and injunction because CEQ subsequently decided that the district court's findings were incorrect. The doctrine of collateral estoppel also barred CEQ's re-adjudication of the district court's factual findings.

b. More fundamentally, it has been well-established since this Court decided *Hayburn's Case* that our constitutional separation of powers doctrine does not permit an agency of the executive branch to review and revise the decisions of an Article III court. CEQ's actions violate this core teaching of *Hayburn's Case* and the separation of powers doctrine.

c. CEQ's findings would be invalid even if the district court had not previously decided the same issue. CEQ purported to exercise an adjudicatory authority, yet no such adjudicatory authority has been delegated to CEQ by Congress. Furthermore, CEQ's determination is not entitled to deference, because CEQ has no expertise with regard to naval training, and it rendered a hasty decision on an incomplete record, without the participation of one of the interested parties, and without offering any

reasoning or analysis for its conclusion that the district court's findings were wrong. Moreover, CEQ's decision-making also violated Section 555(b) of the Administrative Procedures Act ("APA"), which governs informal adjudications of the sort at issue in this case and requires that interested persons be afforded the opportunity to "appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy." 5 U.S.C. § 555(b). CEQ offered no reason why the orderly conduct of public business would have prevented participation by Respondents, and its violation of Section 555(b) deprived Respondents of their substantial rights and was prejudicial.

d. CEQ contravened NEPA by granting the Navy's long-planned military activities an exemption from NEPA's otherwise applicable requirements that lacks any foundation in the statutory text and is inconsistent with Congressional actions restricting military-readiness exemptions to other statutes. NEPA must be observed unless compliance would create an irreconcilable and fundamental conflict with another statutory provision, and based on the district court's findings that the Navy can train and certify its strike groups using the challenged measures, no such conflict is present here.

2. The district court properly applied established equitable principles in issuing its tailored injunction, and the Navy's assignments of error are meritless.

a. The Navy contends that the district court lacked discretion to weigh harms to marine mammals

in this NEPA action because of a national defense exemption that is found in a different statute, the Marine Mammal Protection Act ("MMPA"). The Navy is incorrect. An Article III court's traditional equitable authority cannot be denied or limited absent the clearest command to the contrary from Congress. There is no such clear command in NEPA, which, unlike the MMPA and other environmental statutes, does not contain a national defense exception. Congress has not directed the courts to permit the Navy to harm marine mammals without first sufficiently investigating that harm and determining, as NEPA requires, the extent to which adverse effects can be avoided.

b. The Navy argues that the lower courts' analyses rested on a finding of a "mere possibility" of irreparable harm. The Navy is mistaken. The lower courts found that Respondents had established irreparable harm "to a *near certainty*." The irreparable harm found in this case consisted of harm to Respondents' standing declarants, to the environment, and widespread irreparable species-level harm, including to Cuvier's beaked whales and a number of other marine mammal species. The district court's finding of a "near certainty" of such irreparable harm is not clearly erroneous and, under well settled principles of appellate review, should be affirmed. Therefore, this case does not require examination of the Ninth Circuit's sliding-scale standard for determining irreparable harm, which, in any event, is entirely consistent with this Court's precedents and with the rule in other circuits.

c. The Navy argues that the lower courts failed to give due consideration to the public interest in a

prepared military. This is incorrect. The lower courts paid substantial deference to the Navy regarding not only the importance of MFA sonar training to national security, but also the impact of particular mitigation measures on that training.

The district court specifically *rejected* a number of the mitigation measures proposed by Respondents in deference to the Navy. Deference does not require complete abdication of the federal courts' independence, however. The district court properly engaged in exhaustive fact-finding proceedings to test the Navy's factual assertions that the remaining mitigation measures would prevent the Navy from training and certifying its forces. The court properly considered the substantial evidence that the Navy had, in fact, *repeatedly* trained and certified its forces using the same or very similar mitigation measures before deciding to abandon such mitigation. The district court's factual determination that the Navy could train and certify its strike groups effectively under the challenged mitigation measures is well-supported by the record and is not clearly erroneous.

The Ninth Circuit showed further deference to the Navy by modifying the injunction so that (i) the Navy may obtain expedited relief from the injunctive measures in the event training or certification is actually impeded by the challenged measures, and (ii) pending disposition in this Court, the Navy may suspend the expanded safety zone and modify the power-down if those measures interfere with critical stages of training. App. 91a-95a. The Navy has not sought any emergency relief; instead it has trained and certified its troops under the ordered measures since February 2008. Thus, even if the Court were to

hold that the district court did not afford adequate deference to the views of the Navy declarants, there would be no basis for vacating the injunction *as modified* by the Ninth Circuit, because it is clear from the Navy's post-injunction training activities that the modified injunction has allowed the Navy to train and certify its strike groups. At a minimum, therefore, this Court should affirm the preliminary injunction under the terms of the Ninth Circuit's stay order for the remainder of the SOCAL exercises.

ARGUMENT

I. The District Court Was Not Compelled To Set Aside Its Own Findings And Injunction Based Upon CEQ's Conclusory Determination That Those Findings Were Wrong

After thorough fact-finding proceedings, the district court found that the Navy could train and certify its strike groups using the challenged mitigation measures in light of the Navy's past mitigation practices. Seeking a more favorable forum, the Navy then took its case to CEQ with an abridged record that deliberately omitted critical evidence of prior mitigation on which the court had based its findings. This was an *ex parte* proceeding: Respondents were given no notice or opportunity to be heard. The sole purpose of this adjudication that ignored both Respondents and their evidence was to circumvent a court order by Executive fiat instead of appealing to a higher court, and to replace that binding Article III order with administrative "alternative arrangements" preferred by the Executive. These unprecedented proceedings exceeded the grant of CEQ's authority, violated basic

principles of collateral estoppel and administrative law, and, most fundamentally, violated the separation of powers doctrine. Each of these reasons why CEQ's ruling did not require the district court to dissolve its injunction stands on its own but each of these related violations also compounded and magnified the others. There is no warrant in NEPA, administrative law, or the Constitution for this coordinated attack by the Navy and CEQ on the authority of the federal courts.

A. CEQ Is Not Authorized to Redetermine Factual Issues Decided By A District Court

The Navy paints this case as a run-of-the-mill dispute regarding the deference that a district court owes to an agency's interpretation of its own regulations. *See Auer v. Robbins*, 519 U.S. 452 (1997). In so doing, the Navy ignores a simple and indisputable fact: CEQ could not have determined that "emergency circumstances" existed—under *any* definition of that term—without first rejecting the district court's factual finding that the Navy could train and certify its strike groups under the challenged mitigation measures. Given this reality, there is nothing typical about this dispute. The Court's acceptance of the Navy's position would break new and dangerous ground, by embracing the remarkable proposition that Article III courts must set aside their reasoned findings of fact and dissolve injunctions based thereon when administrative agencies subsequently review and disagree with the courts' findings. It is the role of appellate courts, not administrative agencies, to review district courts' factual findings and consider challenges to their

orders. Neither NEPA nor any principle of law entitled CEQ to subvert that judicial authority or required the district court to treat CEQ's January 2008 letter as though it were a mandate from a higher Article III court.

As discussed above, the Navy argued to the district court that it could not effectively train and certify its strike groups if certain mitigation measures were required. App. 102a-105a. The district court conducted extensive fact-finding—carefully reviewing thousands of pages of briefing and evidence over the course of many weeks, and touring a Navy destroyer—to assess the Navy's contention that the mitigation measures would risk the Navy's ability to train and certify its strike groups. The district court found that the Navy could train and certify its strike groups using the two mitigation measures at issue in this appeal—the safety zone and the power-down requirement during significant surface-ducting conditions. App. 136a; J.A. 87a-88a. The Ninth Circuit affirmed, finding that the evidence, much of it submitted by the Navy itself or discovered in its records of past exercises, supported the district court's findings. App. 81a-82a.

Having failed to persuade the district court that the challenged mitigation measures would prevent it from training and certifying its strike groups, the Navy pressed precisely the same argument in an *ex parte* submission to CEQ. Just three business days later, CEQ issued a letter announcing that the mitigation measures that the district court found would allow training and certification would, in fact, have the opposite effect and that the district court's order therefore created "emergency circumstances"

requiring relief. App. 240a. CEQ supported this finding with a single conclusory statement "that the Navy cannot ensure the necessary training to certify strike groups for deployment under the terms of the injunctive orders." *Id.* It is the position of the Navy that when presented with this document, the district court was required to set aside its own findings and dissolve its injunction.

There is no support for the Navy's position in NEPA, which is the statute by which Congress created CEQ and authorized it to perform the "duty and function" of gathering and analyzing information and making recommendations to the President to assist in formulating national environmental policy. 42 U.S.C. § 4344.[5] Nowhere did Congress delegate any adjudicatory authority to CEQ whatsoever, let alone the power to sit in review of Article III courts.

Nor is there any principle of general administrative law that forces the district court to set aside its own factual findings because an agency subsequently disagrees with them. Although the Navy relies extensively on *Auer v. Robbins*, that decision has no application when, as here, the dispositive issue is not the interpretation of words in a regulation, but instead the resolution of a purely

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[5] CEQ's charge also includes evaluation of "conditions and trends in the quality of the environment"; recommending to the President "national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation"; and preparing "such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request." 42 U.S.C. § 4344. Nothing in section 4344 authorizes adjudications relating to effectiveness of military training or any other subject.

factual issue—whether the Navy can effectively train and certify under the challenged measures—that controls the outcome of the case no matter what definition of "emergency circumstances" applies. Although the district court and the Ninth Circuit were correct that the generally-accepted meaning of "emergency" means an "unexpected" or "unforeseen" occurrence, *see* App 45a n.41, 112a-113a, the present case does not turn on the definitional issue, because even if the Navy were correct that every "condition of urgent need" qualifies as "emergency circumstances," Br. 24, the district court's factual finding that the Navy could train and certify its strike groups establishes that no urgent need exists.

Once the factual issue of whether the Navy could effectively train under the challenged mitigation measures had been submitted to and decided by the district court, the court was not required to defer to a contrary finding subsequently rendered by CEQ. Indeed, CEQ ought to have deferred to the court's factual finding pursuant to the doctrine of collateral estoppel. The district court's factual findings regarding the Navy's ability to train under the challenged mitigation measures were not a preliminary determination, but rather were intended to finally resolve that issue to ensure effective training while the litigation was pending. The district court's factual findings were therefore "final" for purposes of collateral estoppel and were entitled to preclusive effect in proceedings before CEQ. *See Duvall v. Attorney General of the United States*, 436 F.3d 382, 387 (3d Cir. 2006) (agencies must adhere to common-law doctrine of collateral estoppel absent clear conflict with the "structure and purpose" of the governing statute); *see also Abbott Labs. v. Andrx*

Pharms., 473 F.3d 1196, 1206 (Fed. Cir. 2007) (collateral estoppel attaches where "a preliminary injunction proceeding 'clearly intended to firmly and finally resolve the issue,' rather than 'estimate the likelihood of success' of proving that issue"); *Hawksbill Sea Turtle v. Federal Emerg. Mgm't Agency*, 126 F.3d 461, 474 n.11 (3d Cir. 1997) ("findings made in granting or denying preliminary injunctions can have preclusive effect if the circumstances make it likely that the findings are 'sufficiently firm' to persuade the court that there is no compelling reason for permitting them to be litigated again").[6]

This does not mean, of course, that the district court's factual findings were immune from challenge. The Navy could have taken an appeal to the Ninth Circuit, and ultimately to this Court—on an expedited basis if the circumstances warranted—to press its position that the district court erred in finding that the Navy could train and certify its troops under the challenged measures. The Ninth Circuit and this Court could have reviewed the entire

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[6] In some circumstances, a litigant may invoke the doctrine of primary jurisdiction and request a court to stay judicial proceedings while an administrative body resolves material issues that (unlike here) Congress has entrusted to the agency; the court then reviews the agency's determination under a deferential standard of review. *See United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63-64 (1956). The Navy did not request such a referral, and has waived any argument that factual issues should have been decided by CEQ in the first instance. *See Northwest Airlines, Inc. v. County of Kent, Mich.*, 510 U.S. 355, 366 n.10 (1994); *CSX Transportation Co. v. Novolog Bucks Cty.*, 502 F.3d 247, 253 (3d Cir. 2007); *Gross Common Carrier, Inc. v. Baxter Healthcare Corp.*, 51 F.3d 703, 706 (7th Cir. 1995).

record upon which the district court's findings were based, heard argument from Petitioners and Respondents, and, if the findings were determined to be clearly erroneous, relieved the Navy of its obligation to undertake the challenged measures.

The Navy did not pursue these well-established appellate remedies in the first instance. Instead, after eleven months of litigation during which the Navy never sought alternative arrangements from CEQ and never claimed that there was insufficient time to prepare an EIS, the Navy, disappointed with the district court's findings, asked CEQ to step in to review and reject those findings in an *ex parte* proceeding that had no prescribed standard of review, was based on an incomplete record, and deprived Respondents of notice and an opportunity to be heard. Congress has never delegated to CEQ the authority to engage in this practice. There is no such delegation in NEPA, and none in any other statute. The district court was not required to set aside its own findings and dissolve its injunction in deference to the Navy's *ex parte* proceedings before CEQ.

B. Allowing CEQ To Sit As A Court Of Errors Violates The Separation of Powers Doctrine

CEQ's actions in this case violate the separation of powers doctrine. The Constitution establishes a government that "is divided into three distinct and independent branches" and "it is the duty of each to abstain from, and to oppose, encroachments on either." *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n. * (1792); *see also Mistretta v. United States*, 488 U.S. 361, 380 (1989) (the Constitution "mandates" that each branch of government remain "entirely free from

the control or coercive influence, direct or indirect, of either of the others . . .") (quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935)).

The rule that decisions of Article III courts are not subject to revision by officials of the Executive Branch is structural. It is grounded in the Constitution's mandate that "the judicial Power of the United States, shall be vested" in the courts. U.S. Const. art. III, § 1. A decision of an Article III court may be appealed "to judges appointed in the manner the constitution requires, and holding their offices by no other tenure than that of their good behavior," but may not be made "subject[]" "to a mode of revision" by an executive officer who has "cause to suspect imposition or mistake." *Hayburn's Case*, 2 U.S. (2 Dall.) at 410 n. *. "If a federal agency were to exercise [the] power to review the decisions of federal courts, the arrangement would violate the well-established rule that the judgments of Article III courts cannot be revised by the Executive or Legislative Branches." *Alaska Dep't of Envtl. Conservation v. E.P.A.*, 540 U.S. 461, 512 (2004) (Kennedy, J., dissenting) (citing *Hayburn's Case*).

This Court first applied this structural rule in *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), which involved a statute that granted the Secretary of War the power to review decisions of Article III courts concerning disability pension claims. The Supreme Court Justices, sitting as circuit judges, held that this arrangement violated the separation of powers doctrine. Chief Justice Jay, and Justices Cushing and Duane wrote: "[B]y the constitution, neither the Secretary at War, nor any other Executive officer, nor even the Legislature, are authorized to sit as a court

of errors on the judicial acts or opinions of this court." *Id.* at 410 n. *. Separately, Justices Wilson and Blair "deemed radically inconsistent with the independence of that judicial power which is vested in the courts" a scheme permitting "an officer in the executive department" to "revis[e] and contro[l]" the decisions of an Article III court. *Id.*

Hayburn's Case thus forbids non-Article III decision makers from sitting as a "court of errors" over the decisions of Article III courts. *Id.* This structural rule is crucial "both to protect the role of the independent judiciary within the constitutional scheme of tripartite government, . . . and to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (citations and internal quotations omitted). The rule in *Hayburn's Case* has long been a fixed star in this Court's separation of powers jurisprudence. *See United States v. Mitchell*, 463 U.S. 206, 213 n.12 (1983) (executive "revisory authority over the court is inconsistent with its exercise of judicial power"); *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 113-14 (1948) ("[j]udgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of Government"); *United States v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 400-01 (1934) (judicial determination may not be "conditioned" on the revisory power of an agency); *United States v. Waters*, 133 U.S. 208, 213 (1890) (fact-based determinations of the judicial branch

cannot be "subject to the re-examination and reversal of the attorney general").

This Court reaffirmed in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), that "officials of the Executive Branch" lack power to "review . . . the decisions of Article III courts." *Id.* at 218. The Court explained that federal judicial decisions are "subject to review *only* by superior courts in the Article III hierarchy," *id.* at 219 (emphasis added), because the power to "reverse a determination, once made, in a particular case," is a quintessentially *judicial power*. *Id.* at 222 (quoting *The Federalist* No. 81, p. 545 (Alexander Hamilton) (J. Cooke ed. 1961)). Simply put, decisions of Article III courts cannot be reversed or ignored by executive officers. *See Mistretta*, 488 U.S. at 409 ("neither of [the Branches] ought to possess directly or indirectly, an overruling influence over the others.") (quoting *The Federalist* No. 48, p. 332 (James Madison) (J. Cooke ed. 1961)); *Alaska Dep't of Envtl. Conservation*, 540 U.S. at 512 (Kennedy, J., dissenting) ("Judges cannot, without sacrificing the autonomy of their office, put onto the scales of justice some predictive judgment about the probability that an administrator might reverse their rulings.").

As discussed above, CEQ determined that the mitigation measures imposed in the district court's order would prevent the Navy from training and certifying its strike groups and therefore created "emergency circumstances" under which the Navy's compliance with the order should be excused. CEQ did not, and logically could not, make these conclusions without first determining that the district court had erred, because if the court's findings were

correct, the injunction created no "emergency circumstances" warranting "alternative arrangements" under Section 1506.11. CEQ reached its decision that the district court had erred without articulating or applying any standard of review, much less the "clearly erroneous" standard that an Article III court must apply in reviewing a district court's factual determinations. CEQ's actions were unconstitutional. CEQ undertook to adjudicate—to "determine facts, apply a rule of law to those facts, and thus arrive at a decision" at odds with the prior decision of the district court. *Freytag v. Commissioner*, 501 U.S. 868, 909 (1991) (Scalia, J., concurring). By reviewing, re-adjudicating, and contradicting the factual findings of a district court in order to replace the terms of a court-ordered injunction with alternative arrangements, CEQ violated the core teaching of *Hayburn's Case*.

It is no answer to argue that CEQ's actions are permissible because CEQ reviewed a preliminary injunction, not a final judgment. This Court has identified three distinct categories of cases that violate the independence of the judiciary under Article III. The first category of cases are those where this Court "refused to give effect to a statute that was said '[to] prescribe rules of decision to the Judicial Department of the government in cases pending before it.'" *Plaut*, 514 U.S. at 218 (quoting *United States v. Klein*, 80 U.S. 128, 146 (1872)). "The second type of unconstitutional restriction upon the exercise of judicial power . . . stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch." *Id.* The third category bars Congress from "retroactively commanding the federal courts to

reopen final judgments." *Id.* at 219. The distinction between final judgments and injunctive orders is relevant only to the third category. But it is the second category, that Congress cannot vest review of Article III court decisions in the executive, that is at stake here.

This Court's decision in *Miller v. French*, 530 U.S. 327 (2000), similarly provides no support for the Navy's position. In *Miller,* this Court affirmed "*Congress'* authority to alter the prospective effect of previously entered injunctions" by "*amend[ing] applicable law*." *Id.* at 344, 349 (emphasis added). *See also Robertson v. Seattle Audubon Soc'y,* 503 U.S. 429 (1992) (same). Here, Congress did not amend NEPA. Instead, the Navy referred the district court's injunctive order to CEQ; obtained an administrative ruling that the court's factual determinations were wrong and that the injunctive order therefore warranted "alternative arrangements" for compliance with NEPA; and then returned to the district court to argue that CEQ's ruling required the district court to dissolve its injunctive order. Nothing in *Miller*, or elsewhere in the entirety of this Court's Article III jurisprudence, supports the Navy's position that an administrative agency can exercise appellate-type review. Such a clear intrusion on the province of the judiciary is alien to the constitutional separation of powers doctrine and cannot be condoned.

C. CEQ's Findings Would Be Invalid Even If The District Court Had Not Already Decided The Same Issue

CEQ's findings are invalid and not entitled to deference for three additional reasons: (1) Congress has not delegated any adjudicatory authority to CEQ;

(2) CEQ's decision is contrary to Congress' intent in enacting NEPA; and (3) CEQ did not follow the procedural requirements of the APA in connection with making its decision.

1. Congress Has Not Delegated Adjudicatory Authority To CEQ

As discussed above, the "duty and function" of CEQ under NEPA is limited to gathering and analyzing information and making recommendations to the President to assist in formulating national environmental policy. *See* 42 U.S.C. § 4344. The authority to enact implementing regulations was extended not by Congress, but by Presidential Executive Order. *See* Exec. Order No. 11991 3 C.F.R. 123 (1977), *reprinted as amended in* 42 U.S.C. § 4331 (2000). Even that delegation, however, was limited to the authority to "[i]ssue regulations to Federal agencies for the implementation of *the procedural provisions* of the Act" that are "designed to make the environmental impact statement process more useful to decisionmakers and the public; and to reduce the paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives." *Id.* (emphasis added). Neither Congress nor the Executive delegated any adjudicatory authority to CEQ.

Agency action falling outside its delegation of authority is entitled to deference proportional only to its power to persuade. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see United States v. Mead Corp.*, 533 U.S. 218, 231-32 (2001) (limited deference owed to classification rulings where congressional delegation did not include delegation of that

authority); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991) (limited deference owed to agency guideline where congressional delegation did not include power to "promulgate rules or regulations"); *Christensen v. Harris Cty.*, 529 U.S. 576, 596-97 (2000) (Breyer, J., dissenting) (limited deference owed where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency).[7] The weight of deference owed to the agency turns on a variety of factors, including "the thoroughness evident in its consideration" and "the validity of its reasoning." *E.g.*, *Mead Corp.,* 533 U.S. at 228. Here, these factors weigh against according any deference to CEQ.

There is no thoroughness evident in CEQ's consideration. The Navy petitioned CEQ for relief from the district court's injunction on January 10, 2008. A few days later, CEQ announced that the Navy could not train and certify its strike groups under the injunction. CEQ made its finding following *ex parte* consideration of a "record" consisting of only the Navy's evidence and arguments, omitting all contrary evidence. *See* App. 237a. CEQ deliberately ignored, or at a minimum failed to consider, the voluminous substantive evidence that the district court found persuasive and relied on in issuing its injunction. App. 54a-55a. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (agencies cannot "entirely fail[] to consider an important aspect of the problem" or fail to

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[7] Although CEQ's interpretation of NEPA is owed "substantial deference" under *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979), the present case does not involve an interpretation of NEPA.

"examine the relevant data"); *Advocates for Highway and Auto Safety v. Fed'l Motor Carrier Safety Admin.*, 429 F.3d 1136, 1147 (D.C. Cir. 2005) (striking down agency action where the agency "simply disregarded volumes of evidence" contrary to its decision).

CEQ's decision-making is especially deficient in light of CEQ's lack of expertise with regard to naval training. *See Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649-50 (1990) (no deference owed to agency acting outside its expertise). CEQ could do no more than receive evidence and argument from the interested parties on matters outside its expertise and render a decision based thereon. This is precisely the type of adjudication that is reserved for the judiciary in the absence of an express delegation from Congress. Moreover, CEQ *did not* receive evidence and argument from the interested parties, but instead considered only a partial record compiled by one interested party, the Navy. Respondents were not even aware of the CEQ proceedings, let alone afforded an opportunity to participate in them, and the record before CEQ was as biased as it was incomplete. Despite its lack of expertise and the woefully deficient record (or perhaps because of it), CEQ reached its determination regarding the Navy's ability to train in just a few days, a small fraction of the time the district court had already invested in this matter.

Worse yet, CEQ offered no reasoning or analysis to support its necessary finding that the Navy could not effectively train and certify its troops under the injunction. App. 240a. CEQ simply rubber-stamped the Navy's position. Agency decisions rendered in this fashion are not entitled to deference. *See*

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167 (1962).

2. CEQ's Decision Is Contrary To Congress' Intent In Enacting NEPA

Congress enacted NEPA to ensure that federal agencies "promote efforts which will prevent or eliminate damage to the environment." 42 U.S.C. § 4321. NEPA requires federal agencies to prepare an EIS for any major federal action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Unlike other environmental statutes, NEPA contains no national security exemption. App. 51a-52a.

CEQ's decision to exempt the Navy's long-planned military activities from NEPA undermines the fundamental purposes of the statute and the statutory scheme Congress enacted. *See United States v. Larionoff*, 431 U.S. 864, 873 (1977); *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 25-27 (1982). Congress not only reserved for itself, *but has repeatedly exercised* the power to exempt long-planned agency activities from NEPA's otherwise-applicable statutory requirements. *See*, *e.g.*, Fiscal Year 2001 National Defense Auth. Act, Pub. L. No. 106-398, § 317, 114 Stat. 1654, 1654A-57 (2000) (specifically exempting Defense Department from preparing nationwide EIS for low-level flight training); 42 U.S.C. § 10141(c) (exempting EPA from NEPA review of criteria for handling spent nuclear fuel and high-level radioactive waste); 43 U.S.C. § 1652(d) (exempting construction of Trans-Alaska Pipeline from further NEPA compliance). Congress has never delegated such power, expressly or implicitly, to CEQ.

CEQ contravened NEPA by granting the Navy an exemption from NEPA's otherwise applicable requirements that lacks any foundation in the statutory text. 42 U.S.C. § 4332 requires the Navy to comply "to the fullest extent possible" with NEPA. In interpreting this clause, this Court has previously held that NEPA must be observed unless compliance "would create an irreconcilable and fundamental conflict" with another statutory provision. *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 787-88 (1976); *see* 40 C.F.R. § 1500.6.[8] In this case, no statutory provision renders the Navy's observance of NEPA unattainable. Although the Navy contends that NEPA must give way to its statutory obligation to be "organized, trained, and equipped," 10 U.S.C. § 5062, there is no "irreconcilable" conflict present. As the Ninth Circuit explained, the district court determined that "the [mitigation] measures would not preclude the Navy from effectively training and certifying forces for deployment to combat zones in the western Pacific and the Middle East." App. 79a. By obeying the preliminary injunction, the Navy would therefore meet its responsibility to train under section 5062.

Moreover, NEPA compliance for the SOCAL exercises—which were planned in 2006—was neither impossible nor impractical. The Navy could have

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[8] While section 42 U.S.C. § 4331(a) exhorts the Federal Government to "use all practicable means" to coordinate federal programs to achieve NEPA's substantive goals, 42 U.S.C. § 4331(a), this declaration does not modify the "to the fullest extent possible language" in section 4332 or diminish the EIS and other requirements set forth in section 4332. *See Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114-15 (D.C. Cir. 1971).

prepared an EIS and avoided the court injunction altogether. The Navy could also have requested a Congressional exemption at any point, including in the many months following the August 2007 order finding a prospective violation of NEPA. It chose not to do so. Absent such action, Congress left it to the equitable powers of the courts to determine whether and on what terms long-planned agency activities that courts determine to be non-compliant with NEPA should be allowed to proceed.

If Petitioners' view were the law, the military could simply forego NEPA compliance, await the inevitable court order, and then obtain an administrative determination that environmental compliance is excused by the court's decision to enforce the law. The court of appeals properly rejected the Navy's attempt to interpret CEQ's regulation in this manner and thus create a gaping hole in NEPA. App. 51a-52a; *see Calvert Cliffs'*, 449 F.2d at 1114 (NEPA "does not provide an escape hatch for footdragging agencies" and "does not make NEPA's procedural requirements somehow 'discretionary'").[9]

[9] CEQ's conduct also exceeded the scope of 40 C.F.R § 1506.11. First, the text of section 1506.11 limits CEQ's authority to "alternative arrangements" that provide relief from "observing [CEQ's] regulations." 40 C.F.R. § 1506.11. Nothing in the regulation authorizes CEQ to provide relief from statutory requirements. Second, the regulation requires CEQ and the affected federal agency to "limit [alternative] arrangements" to actions necessary to control the immediate impacts" of the supposed emergency, *id.*, yet CEQ provided the Navy with alternative arrangements lasting a full year.

3. CEQ's Decision Is Invalid Based On The Agency's Failure To Comply With The APA

The APA requires a court to reject as unlawful and set aside agency action, findings, and conclusions rendered "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). Section 555(b) of the APA governs informal adjudications of the sort at issue in this case[10] and requires that interested persons be afforded the opportunity to "appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy." 5 U.S.C. § 555(b); *see Indep. U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 922-23 (D.C. Cir. 1982) (courts "have required some explanation for agency action and, to ensure the adequacy of that explanation, some opportunity for interested parties to be informed of and comment upon the relevant evidence before the agency"); *Block v. SEC*, 50 F.3d 1078, 1085 (D.C. Cir. 1995) ("[Section] 555(b) is universally understood to establish the right of an interested person to participate in an on-going agency proceeding."); Wright & Koch, Federal Practice and Procedure: Judicial Review § 8136 ("Generally, all informal adjudications have some form of the three elements—notice, some opportunity to participate and reasons.").

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[10] "Informal adjudication is a residual category including all agency actions that are not rulemaking and that need not be conducted through 'on the record' hearings." *Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 361 n.37 (D.C. Cir. 1981).

CEQ did not comply with these procedural requirements. Respondents, who had successfully obtained the injunction from which the Navy sought relief, were plainly "interested persons" within the meaning of Section 555(b). *See Nichols v. Bd. of Trustees of the Asbestos Workers Local 24 Pension Plan*, 835 F.2d 881, 896 (D.C. Cir. 1987) ("[A] party entitled to judicial review of agency action clearly qualifies as an 'interested person' who normally may intervene in the administrative proceeding."). CEQ did not provide Respondents notice of or an opportunity to participate in its proceedings, even if only to submit the evidence the district court considered and relied upon in making the very factual findings that the Navy was now pressing CEQ to reverse. Instead, CEQ made its findings based on an incomplete and one-sided record submitted by, and *ex parte* discussions with, the Navy. Such conduct may be justified in different circumstances where a *bona fide* emergency exists such that *immediate* action is required. CEQ, however, did not provide any reason why "the orderly conduct of public business" would have prevented participation by NRDC. *See Am. Communications Ass'n v. United States*, 298 F.2d 648, 650 (2d Cir. 1962) (construing APA § 6(a), which contains language similar to §555(b), "to give 'any interested person' the right to intervene in a proceeding so far as the orderly conduct of public business permits").

CEQ's violation of Section 555(b) deprived Respondents of their substantial rights and was prejudicial. *See Connor v. U.S. Civ. Serv. Comm'n*, 721 F.2d 1054, 1056-57 (6th Cir. 1983) (procedural errors are not harmless where "the claimant has been prejudiced on the merits or deprived of substantial

rights because of the agency's procedural lapses"). CEQ rendered its decision based on an incomplete and highly selective record assembled by the Navy. An experienced district court judge and three experienced appellate judges considered a complete and unbiased record and rejected the Navy's position. Had CEQ been presented with that same record, there is a substantial question whether CEQ would have reached a different conclusion.

II. The Courts Below Applied Traditional Equitable Principles In Granting Tailored Preliminary Relief

The Navy makes three arguments in support of its contention that, even if the district court correctly found that it likely violated NEPA, the court erred in granting the tailored injunctive relief under review. None is persuasive.

A. The MMPA Exemption Does Not Indicate Congressional Intent to Curtail Courts' Equitable Powers To Enforce NEPA

The Navy first argues that the national defense exemption in the MMPA, which authorizes the Secretary of Defense to exempt from that statute military activity that is "necessary for national defense," 16 U.S.C. § 1371(f)(1), restricts a court's exercise of traditional equity jurisprudence in cases enforcing NEPA, an entirely separate statute.

The Navy's argument violates the longstanding rule that an Article III court's traditional equitable authority cannot be denied or limited "[a]bsent the clearest command to the contrary from Congress." *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979).

"Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). In each of the cases cited by the Navy, the "balance that Congress has struck" appears clearly in the very statute being enforced. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 491 (2001); *TVA v. Hill*, 437 U.S. 153, 189 (1978); *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 551-52 (1936); *see also Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 543-44 (1987) (focusing only on whether anything "*in the Act's* language, structure or legislative history" and "in § 810" manifested an intent to deny courts equitable discretion under that statute) (emphasis added).

There is no such clear command here. To the contrary, since first enacting NEPA 39 years ago, Congress has never amended the Act to provide a national security exemption, despite the near-ubiquity of such exemptions in other environmental laws. App. 51a n.45. Indeed, Congress refused to excuse the Navy from NEPA compliance when it enacted the 2003 MMPA amendments in response to the decision in *NRDC v. Evans*, 232 F. Supp. 2d 1003 (N.D. Cal. 2002), where the court had predicated its injunction against Navy sonar on likely violations of *both* the MMPA and NEPA. *Id.* at 1053. Responding to *Evans*, Congress sought to "cure deficiencies related to the incidental take permit process under MMPA," H.R. Rep. No. 108-354, at 669 (2003) (Conf. Rep.), but did not enact any corresponding NEPA exemption. *Id.* More recently, Congress reaffirmed

the specific view that Navy sonar projects should not move forward without prior NEPA review, deleting funding for a key Navy sonar training range off North Carolina because the draft EIS was suspect, and allowing expenditures only for NEPA compliance. H.R. Rep. No. 109-504, at 146 (2006); H.R. Rep. No. 109-676 (2006); 152 Cong. Rec. H7135 (2006).

Congress has had good reason not to include a parallel to Section 1371(f) in NEPA. NEPA's "manifest concern [is] preventing uninformed action." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371 (1989). In enacting NEPA, Congress was concerned that decision-makers should not "act on incomplete information." *Id.* Nowhere in NEPA has Congress indicated that the Navy must be allowed to harm marine mammals during training exercises without first sufficiently investigating that harm and determining, as NEPA requires, "the extent to which adverse effects can be avoided." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989). Nor does Section 1371(f) of the MMPA, or anything in its legislative history, indicate that Congress intended to allow the Navy to take marine mammals while training without first becoming informed through the required NEPA analysis. *See* Pub. L. No. 108-136; H.R. Rep. No. 108-354, at 668-69; H.R. Rep. No. 108-106, at 308-09 (2003).

Because there is "nothing in the language and structure [or] legislative history" of the 1371(f) exemption "suggest[ing] that Congress intended to deny courts their traditional equitable discretion" in NEPA cases, the Navy's argument that the district court lacked discretion to weigh harms to marine

mammals must be rejected. *Amoco*, 480 U.S. at 543.[11]

B. Plaintiffs' Showing of a "Near Certainty" of Irreparable Harm Far Exceeds That Necessary To Support The Injunction

1. Despite the Navy's claims to the contrary, Br. 38, the lower courts' irreparable harm analysis did not rest on a finding of "mere possibility." The district court held (and the Ninth Circuit specifically affirmed) that Respondents had established "to a *near certainty*" irreparable harm "to the environment and [Respondents'] standing declarants," as well as widespread irreparable species-level harm. App. 216a-217a (emphasis added).

The district court's finding of a "near certainty" of irreparable harm must be affirmed absent clear error. Fed. R. App. Proc. 52. The clearly erroneous standard "plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to

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[11] The Navy's claim that a court's equitable discretion is somehow lessened when compliance is reviewed under the APA, Br. 37, has been rejected by this Court. *Darby v. Cisneros*, 509 U.S. 137, 152-53 (1993) (holding that the provision of the APA relied on by the Navy here, preserving the "power or duty of the court to . . . deny relief on any . . . appropriate legal or equitable ground," was added "simply to make clear that 'all other than the law of sovereign immunity remained unchanged'" and, thus, the amendment "did not affect any other limitation on judicial review") (quoting S.Rep. No. 94-996 at 11 (1976)).

duplicate the role of the lower court." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985).

The Navy effectively conceded that the SOCAL exercises will have a significant effect on the environment by seeking to avail itself of the "emergency circumstances" exception of 40 C.F.R. § 1506.11, which is applicable only when such an impact will result. Moreover, the district court's finding of "near certainty" of irreparable harm is amply supported by the record. As discussed above, *supra* pp. 3-6, Respondents submitted extensive scientific evidence showing that MFA sonar causes serious, debilitating, and even lethal injuries as well as "profound" and widespread behavioral disruptions in marine mammals. App. 11a-16a; *see also*, *e.g.*, J.A. 360-62, 469-80, 486-92, 579-89, 598-603, 635-46, 652-723, 729-46, 756-779; S.E.R. 160-71, 180-86, 232-258, 264-309; 71 Fed. Reg. 38727 (2006).

The Navy's own take estimates in its EA also strongly reinforce the district court's finding. App. 216a-217a. The EA estimated that the SOCAL exercises would result in approximately 170,000 takes of marine mammals, an extraordinary number relative to the size of cetacean populations off Southern California. For instance, the EA projected that 900 takes of pygmy sperm whales, a deep-water stock as small as 119 animals, would occur during each year of the challenged exercises. J.A. 223-24; E.R. 341-43. Similarly, the SOCAL exercises would take as much as 25 percent of the eastern Pacific population of endangered blue whales and 15 to 20

percent of five distinct dolphin populations annually. J.A. 223-24, 391; E.R. 341-43; App. 66a.[12]

The Navy insists that this Court turn a blind eye to these damning EA numbers. The Navy asserts that the EA's failure to account for the effect of the Navy's proposed mitigation measures renders this document unreliable. Br. 44, 45 n.9. NMFS, however, has concluded that while the EA overestimates exposures in some instances and underestimates exposures in others, on the whole it represents a "reasonable approximation" of the number of exposures that will result from the exercises. E.R. 1070.[13] The Navy's suggestion that

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[12] Petitioners argue, Br. 45 n.9, that the behavioral disruptions estimated in the EA would not result in an abandonment or significant alteration in behavior (*i.e.*, Level B harassment, J.A. 161, 223-24). But the EA's modeling of Level B exposures was based on the 173 decibel standard for Level B harassment established by NMFS, 71 Fed. Reg. 38710, 38727 (2006), and the EA states that the Navy is "requesting harassment authorization at the NMFS-required level." E.R. 220. Moreover, there is "compelling evidence" that marine mammals are significantly affected by sonar even at levels below the 173 decibel threshold. *OMI*, 546 F.Supp.2d at 965, 973-75.

[13] Nevertheless, the Navy's claim that NEPA's "central purpose…was fully served" by the preparation of its "293-page" EA, Br. 49, is wrong. As the district court held, the Navy's document is inadequate even as an EA (let alone an EIS) due in part to the Navy's "failure to study and analyze the potential for…cumulative impacts." App. 210a-11a. The EA was also held deficient in its failure to adequately analyze reasonable alternatives, including mitigation alternatives. App. 207-10a. Finally, the EA was not made available for public comment as a draft, as NEPA requires for actions significantly affecting the environment. *Robertson*, 490 U.S. at 349 (central purpose of

"the vast majority" of the takes predicted in the EA "would be avoided" through its proposed mitigation measures, Br. 45 n.9, is also contradicted by the Navy's mitigation records from prior exercises, which reflect the difficulty in visually spotting marine mammals from fast-moving vessels, and by its plans to operate at night and during other periods of low visibility, when sighting rates for marine mammals are "severely reduce[d]." App. 64a n.50 (finding SOCAL measures would prevent only a small fraction of takes); S.E.R. 349 (Navy estimate of 5% visual detection rate), 350, 355; J.A. 482-83, 585-86.

The Navy further argues that the EA's prediction of 548 permanent injuries for beaked whales is based on flawed assumptions in the Navy's own analysis. Br. 44-45. But as the Ninth Circuit observed, the Navy's pre-litigation decision to categorize those takes as permanent injuries is supported by "ample evidence indicating that beaked whales are particularly vulnerable to MFA sonar," App. 62a, and the EA itself concludes that beaked whales are to be "assessed differently from other species to account for factors that may have contributed to prior beaked whale strandings." J.A. 173-74.

Finally, the Navy contends that its 40-year history of operation in SOCAL proves, contrary to the consensus predictions of scientists and its own EA, that the planned sonar use is unlikely to harm

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NEPA is "guarantee[ing] that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision"). The mere heft of a document cannot substitute for analytical soundness and public disclosure. *Anderson v. Evans*, 314 F.3d 1006, 1023 (9th Cir. 2002).

marine mammals. Br. 43. However, as the district court found, NMFS's own stock assessments for the impacted beaked whale populations concede that injuries and mortalities would *rarely be documented* given the offshore location of the Navy's exercises and the "low probability that an injured or dead beaked whale would strand." App. 22a, 76a, 204a; J.A. 728; S.E.R.2 923. Indeed, NMFS scientists have determined it highly improbable that even a catastrophic decline of 5% per year over 15 years would be detected in California beaked whale populations—or in nearly any other California stock of marine mammals—given the lack of adequate survey effort. J.A. 747-55; App 23a. Similarly, the Navy's argument that strandings cannot occur unless each of five separate factors (including surface-ducting conditions and steep bathymetry) is present, Br. 42, is specious. This claim has been rejected by the Ninth Circuit and publicly repudiated by NMFS, which concluded that the presence of any one of these factors may increase the likelihood of injury and death. *See* 71 Fed. Reg. 38718-19 (2006); App. 68-69a.

2. The Navy also argues that Respondents will suffer no irreparable injury unless the substantial harm that the Navy's MFA sonar training will likely cause to marine mammals damages entire species. The Navy cites *Fund for Animals v. Frizzell*, 530 F.2d 982 (D.C. Cir. 1975), for the proposition that irreparable harm cannot be established absent evidence of "irretrievabl[e] damage [to] the species." *Id.* at 987. That case, however, involved the permitted hunting of abundant game birds whose populations were actively managed by wildlife agencies to allow significant takes every year. *Id.* at

986. The plaintiffs "made only non-specific claims of 'the destruction and loss of wildlife,'" *id.* at 987, and apparently failed to submit any specific evidence as to harms they would suffer aside from harm to their general interest in "the protection of animals and wildlife." *Fund for Animals v. Frizzell,* 402 F.Supp. 35, 36 n.1 (D.D.C. 1975). The case has no application where, as here, plaintiffs have submitted declarations asserting specific, personal interests that would be harmed by the proposed action. *Cf. Davis v. Mineta*, 302 F.3d 1104, 1115 (10th Cir. 2002) (finding irreparable harm where plaintiffs made "a specific showing that the environmental harm results in irreparable injury to their specific environmental interests"). *Frizzell* has been especially discredited where affected animals are threatened or endangered. *See Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1256-58 (10th Cir. 2003) (rejecting species-level harm argument where animals "belong to a threatened species").[14]

Indeed, courts routinely recognize that harm to less than an entire species is irreparable and justifies injunctive relief when appropriately balanced against competing interests. *Nat'l Audubon Soc'y v. Navy*, 422 F.3d 174, 183 (4th Cir. 2005) (affirming portions of injunction necessary to prevent harm to birdwatchers where actions might "reduc[e] [birds'] feeding and resting times, alter their behavior, hinder their migration, and decrease their populations");

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[14] The only other case cited by the Navy is *Water Keeper Alliance v. U.S. Dep't of Def.*, 271 F.3d 21, 34 (1st Cir. 2001), which merely held that a district court *did not abuse its discretion* in finding that the death of a single endangered species failed to create the potential for irreparable harm.

Nat'l Parks & Conservation Ass'n. v. Babbitt, 241 F.3d 722, 732 (9th Cir. 2001) (finding irreparable harm from increased ship traffic that would cause "adverse behavioral responses" in animals viewed by park visitors); *Sierra Club v. Marsh,* 872 F.2d 497, 500 (1st Cir. 1989) (issuing injunction based on potential impacts to environment without evidence of population-threatening harm); *Fund for Econ. Trends v. Heckler,* 756 F.2d 143 (D.C. Cir. 1985) (affirming same); *Humane Soc'y v. Gutierrez*, 523 F.3d 990, 991 (9th Cir. 2008) (finding irreparable harm from lethal takes of individual sea lions); *Anglers of the Au Sable v. U.S. Forest Serv.*, 402 F. Supp. 2d 826, 837 (E.D. Mich. 2005) (enjoining drilling project where "wildlife patterns would be altered," "predator-prey relationships would be changed," "habitat[s] would be destroyed," and "recreational opportunities would be lost"). This Court has itself recognized that most environmental injuries will not be "adequately remedied by money damages" and are often "permanent or at least of long duration, *i.e.*, irreparable." *Amoco*, 480 U.S. at 545.

Respondents' declarants include a docent who takes weekly whale watching trips on the SOCAL range; sailors and others who regularly swim with and view the very populations of animals that would be impacted by the SOCAL exercises; and one of the world's leading undersea photographers, who regularly dives, works, and recreates in these waters. J.A. 390-91 (docent); J.A. 386-87, 403-05, 408, 411-12, 427-28, 430-31, 433-35, 437-38 (sailors, divers, kayakers, whale watchers); J.A. 398-99 (Jean-Michel Cousteau). Another declarant is a volunteer marine mammal rescuer who has an aesthetic and vocational interest in reducing the number of injured marine mammals she

witnesses. J.A. 446-47. The district court's factual finding that these and Respondents' other declarants, who have wide-ranging connections to the affected populations of animals, would be irreparably harmed by the debilitating injuries and broad-scale disruptions caused by the Navy's sonar exercises was not clearly erroneous, especially given the record evidence that past sonar use has resulted in deaths and debilitating injuries, as well as habitat displacement and significant declines in the observation of commonly seen populations over entire exercise areas. J.A. 390-91, 398-99, 423-24, 445-47, 473-74, 582-83, 590-91, 598-603, 652-723, 756-79; S.E.R.2 232-33. *See, e.g., Nat'l Audubon Soc'y*, 422 F.3d at 183; *Babbitt*, 241 F.3d at 732.

Finally, even if a demonstration of species-level harm were required, the Ninth Circuit specifically determined that marine mammals would be adversely impacted by the SOCAL exercises at the species or stock level. App. 77a. As just two examples, the Navy's own EA estimated that the SOCAL exercises would cause takes of up to 25 percent of the eastern Pacific population of endangered blue whales, and 436 Level A harassments of Cuvier's beaked whales out of an entire west-coast population of as few as 1,121 members. J.A. 223-24; E.R. 341-43; App. 19a; S.E.R.2 927.

3. Because the district court's finding of a "near certainty" of irreparable harm is plainly supported by the record, this is not a proper case to decide whether, and under what circumstances, injunctive relief may issue on a showing of a "possibility" of irreparable harm.

Nonetheless, if the Court were to reach the issue, the Ninth Circuit's sliding-scale irreparable harm standard is entirely consistent with this Court's precedents and with the rule in other circuits. *See Brown v. Choate*, 411 U.S. 452, 456 (1973) (affirming a preliminary injunction after determining that the district court "properly addressed itself to. . .the possibility that irreparable injury would have resulted, absent interlocutory relief"); *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 323 (D.C. Cir. 1987) (affirming preliminary injunction where challenged actions "could lead" to irreparable injury); *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 427 (2d Cir. 2004) (approving decision affirming a preliminary injunction upon a showing of a "possibility of irreparable harm"); *Carey v. Klutznick*, 637 F.2d 834, 837 (2d Cir. 1980) ("[E]very irreparable injury is merely a possibility until it is actual and can no longer be averted. Real and imminent, not remote, irreparable harm is what must be demonstrated…"); *Indust. Elect. Corp. v. Cline*, 330 F.2d 480, 483 (3d Cir. 1964) (preliminary injunction may issue upon a showing that irreparable injury would "possibly result" if relief is denied); *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 196 (4th Cir. 1977) ("The importance of probability of success increases as the probability of irreparable injury diminishes; and where the latter may be characterized as simply 'possible,' the former can be decisive."); *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976) (preliminary injunctive relief requires showing "the possibility of irreparable harm"); *Tri-State Generation and Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 356 (10th Cir. 1986) ("[I]n deciding whether a preliminary injunction should issue, we are only examining the possible

course of events between the present time and the conclusion of the underlying litigation.").[15]

The Navy simply misreads cases and cherry-picks dicta to claim otherwise. For example, although *Doran v. Salem IMM, Inc.*, 422 U.S. 922, 932 (1975), used the phrase "will suffer" in a general recitation of the elements required for granting a preliminary injunction, this Court upheld the district court's grant of a preliminary injunction on the ground that there was a *possibility* that the respondents would become bankrupt absent injunctive relief. Thus, *Doran* provides no support for the Navy's position and is in accord with *Brown* and the Ninth Circuit. The Navy's other cases are also easily distinguished. *See, e.g.*, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 340 (1999) (Ginsburg, J., concurring in part and dissenting) (stating requirements for equitable relief, but not addressing the applicable irreparable injury standard); *Amoco*, 480 U.S. at 545, 546 n.12 (same); *In Re DeLorean Motor Co.*, 775 F.2d 1223, 1229 (6th Cir. 1985) (same).

The broad consensus in favor of a sliding-scale approach is especially sensible in the context of NEPA, the purpose of which is to "insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which *may have an impact* on man's environment." 42

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[15] Importantly, the Ninth Circuit, like other circuits, *rejects* claims of irreparable harm that are merely "speculative," "remote," "tenuous," "insignificant," or "insubstantial." *See Paramount Land Co. v. Cal. Pistachio Comm'n*, 491 F.3d 1003, 1012 (9th Cir. 2007) (vacating preliminary injunction); *Goldie's Bookstore v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984) ("Speculative injury does not constitute irreparable injury.").

U.S.C. § 4332(emphasis added). Stripping courts of discretion to issue injunctions where litigants show a possibility of harm would, perversely, allow federal agencies to proceed with projects in precisely those cases where an EIS is a precondition to action. *See, e.g.*, *Babbitt*, 241 F.3d at 737-38 ("Where an EIS is required, allowing a potentially environmentally damaging project to proceed prior to its preparation runs contrary to the very purpose of the statutory requirement.").

C. The District Court Did Not Abuse Its Discretion in Balancing the Equities

Finally, the Navy argues that the lower court abused its discretion in balancing the hardships of the parties and the public interest. The decision of a district court to grant a preliminary injunction is reviewed for an abuse of discretion. *See Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004); *Pharmaceutical Research & Mfgs. of Am. v. Walsh*, 538 U.S. 644, 661 (2003). The district court did not abuse its discretion in this case.

"The essence of equity jurisdiction has been the power of the [court] to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). The Navy attempts to paint the district court's injunction as one that elevated the interests of marine mammals and Respondents above those of the Navy and the public interest in a trained military. Not so. Although the district court's first injunction would have prohibited the use of MFA sonar in the SOCAL exercises pending the Navy's compliance with NEPA, the tailored injunction that the district court entered

following the first appeal to the Ninth Circuit was carefully crafted to balance these competing interests and, above all else, to ensure that the Navy could train and certify its strike groups. *See* App. 35a, 103a-04a. Indeed, the district court accepted without question the Navy's contention that the use of MFA sonar is essential to national security and the United States' ability to conduct warfare operations and thus permitted training to go forward that, even with the required mitigation measures in place, threatens to injure and kill marine mammals. App. 78a, 103a-04a. The district court most certainly did not ignore the magnitude of potential harm to the Navy or to the public interest if the Navy could not train.

The Navy also argues that the district court abused its discretion in failing to defer to the views of the Chief of Naval Operations ("CNO") and several Navy officers as expressed in declarations prepared specifically for this litigation regarding the effectiveness of naval training under the required mitigation measures. The Navy is wrong. The district court paid substantial deference to the Navy regarding not only the importance of MFA sonar training to national security, but also the impact of particular mitigation measures on that training. Indeed, the district court specifically *rejected* several mitigation measures proposed by Respondents in deference to the Navy. App. 35a, 103-104a. Deference, however, does not mean suspension of judgment. The district court's determination that the Navy could conduct its training exercises under the challenged mitigation measures is well-supported by the record.

First, with respect to the 6 decibel power-down requirement, the Navy argues, Br. 53-54, that the district court did not adequately defer to a Navy declaration that "[t]raining in surface-ducting conditions is critical to effective training because such conditions alter sonar transmissions and submarines take advantage of these sound distortions." App. 333a; *see also* App. 299a-300a; Br. 13. Because surface-ducting conditions occur only rarely in the waters in SOCAL—a fact the Navy concedes—the suggestion that testing under those conditions is a "critical" aspect of the SOCAL exercises is not credible. Indeed, such assertions are belied by the fact that the Navy trained and certified its troops during 8 SOCAL exercises despite the complete absence of such conditions. App. 86a. In any event, the Navy conceded at oral argument before the Ninth Circuit that it *can* certify strike groups notwithstanding the inability to train in surface-ducting conditions. App. 80a n.61. This admission forecloses any argument that the district court abused its discretion in failing to afford sufficient deference to Navy declarations. *See id*.

Second, with respect to the 2,200 yard safety zone, the Navy argues that the district court should have deferred to the judgment of the CNO and other naval officers that the shutdown requirement would "unacceptabl[y] risk" training and national security. Br. 51. Importantly, neither the CNO nor the other naval officers asserted that mandatory shutdowns would preclude the effective training and certification of strike groups; in fact, the Navy itself proposed mitigation measures to the district court that involve the mandatory cessation of sonar transmissions if a marine mammal comes within a specified distance of

the sonar source. App. 103a. Rather, the CNO and other naval officers declared that the district court's selection of a safety zone larger than that proposed by the Navy would "exponentially increase[] the number of times that a ship will have to shut down active sonar" and result in "constant stopping and starting of [MFA sonar], leading to exercise event disruption." App. 332a; *see* App. 344a-345a, 356a.

The district court did not dismiss these declarations out of hand, but instead found that these litigation pronouncements were directly contradicted by the Navy's own record of over a year's worth of COMPTUEX and JTFEX training in SOCAL. That record shows that a 2,000 yard expansion would only minimally (not exponentially) increase the number of shutdowns and would not result in constant stopping and starting, with the Navy having to shut down or power down only approximately once more per exercise. App. 84a.[16] The Navy presented no facts

[16] As the Court of Appeals observed, the Navy's after-action reports indicate that it would have had to secure its sonar "at most" 21 additional times during an entire year of training on the SOCAL range. App. 83a. Petitioners challenge this finding, as they did below, by claiming that 15 of Navy's reported shutdowns occurred "voluntarily," when marine mammals were sighted beyond the official shutdown distance of 200 meters, and therefore must have occurred during "tactically insignificant" periods of an exercise. Br. 52. As the appeals court found, however, the Navy's reports do not support this contention: on the contrary, they indicate that a number of these shut-downs, on *both* sides of the 200 meter distance, occurred with an exercise target in the vicinity. App. 84a; Pet. C.A. Emergency Mot. for Stay Pending Appeal ("Navy Stay Mot."), Ex. 16, Att. C at 14, Att. D at 11. Although the Navy further argues that it "continued to employ MFA sonar in 72% of [its] encounters with marine mammals between 200 and 2200 yards," Br. 52, this characterization omits the fact that, under

suggesting that the few additional shutdowns and interruptions would have any meaningful impact on the SOCAL exercises, let alone prevent the Navy from training and certifying its strike groups. Thus, the Navy's argument boils down to the novel contention that the district court was required to accept the Navy's litigation pronouncements regarding the predicted frequency of shutdowns under a 2,200 yard safety zone notwithstanding directly contradictory data from the Navy's own files.[17]

The law does not require (or even permit) such a complete abdication of the district court's fact-finding role. As this Court has recently and repeatedly affirmed, courts perform a vital function when they review claims of the military about needs and constraints. *See Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Duncan v. Kahanamoku*, 327 U.S. 304, 322-23 (1946). Even in cases involving significant national security concerns, "deference is not equivalent to acquiescence" and courts have a duty to

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its own mitigation protocol, the Navy powered-down sonar by 75 percent or more in the majority of these cases—an action that it has elsewhere claimed (as it does with the shutdown condition at issue in this case, App. 84a) is detrimental to training. Br. 53; Navy Stay Mot., Ex. 16, Att. E at 6.

[17] The Navy relied almost exclusively on declarations and statements prepared in the course of litigation. The district court was well within its discretion in crediting the voluminous substantive evidence submitted by Respondents of the Navy's actual past practices and statements predating the litigation, and in finding, with respect to the measures that it imposed, that the evidence in the record outweighed the Navy's assertions of harm. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988); *Burger v. Kemp*, 483 U.S. 776, 806 n.11 (1987); *District of Columbia v. Murphy*, 314 U.S. 441, 456 (1941).

independently assess such claims and weigh them against competing interests. *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998); *Coldiron v. U.S. Dep't of Justice*, 310 F. Supp. 2d 44, 53 (D.D.C. 2004). Judicial review of Executive assertions of harm takes on even greater importance in turbulent times when the balance of powers is most vulnerable to overreaching by the Executive. *See Duncan*, 327 U.S. at 322-23; *Hamdan v. Rumsfeld,* 548 U.S. 557, 636-37 (2006) (Kennedy, J., concurring). The district court did not abuse its discretion in declining to accept the Navy's litigation pronouncements at face value and instead examining the Navy's own past practices and other pre-litigation statements and conduct.[18]

Although that could be the end of the analysis, the Ninth Circuit went further to eliminate even the possibility, however remote, that the public interest would be harmed as a consequence of the district court's injunction. On February 29, 2008, the same date it filed its decision affirming the district court's preliminary injunction, the Ninth Circuit *sua sponte* modified the injunction so that: (1) the Navy need not

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[18] The President's invocation of an exemption to the Coastal Zone Management Act ("CZMA") does not alter the calculus. The CZMA exemption was based on a finding that "the COMPTUEX and JTFEX, including the use of mid-frequency active sonar in these exercises, are in the paramount interest of the United States." App. 232a. The courts below found that the Navy could in fact conduct its sonar training under the terms of the injunction, and the Navy has been training and certifying its strike groups under the terms of the injunction. The conduct of these exercises and the use of MFA sonar therein is thus not in doubt, and the Ninth Circuit has provided a mechanism for the Navy to petition for emergency relief should unexpected difficulties arise.

comply with the 2,200 yard safety zone at critical points in the exercises, but can instead employ the 1,000 meter, 500 meter, and 200 meter safety zones that the Navy advocated in the district court; and (2) the Navy need only reduce the MFA sonar level during significant surface-ducting conditions if marine mammals are detected within a certain distance from the sonar source. App. 93a-94a. These modifications remain in effect, and enforcement of the more stringent safety-zone and power-down requirements in the unmodified injunction has been stayed pending final disposition by this Court. App. 95a.

Consequently, even if this Court were to hold that the district court did not afford adequate deference to the views of the Navy declarants, there would be no basis for vacating the injunction *as modified* by the Ninth Circuit. The Navy has never argued that the modified injunction prevents it from effectively training and certifying its strike groups or otherwise poses a risk to national security, and it has now trained under the terms of that modified injunction since February 2008. At a minimum, therefore, this Court should affirm the preliminary injunction under the terms of the Ninth Circuit's stay order for the remainder of the SOCAL exercises that are the focus of this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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